This document contains materials subject to a Protective Order entered in this action. Its contents are not to be displayed, revealed or made public, except by order of the Court.

REDACTED COPY

Francis J. Earley (FE-7520)
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY and POPEO, P.C.
666 Third Avenue
New York, New York 10017
(212) 935-3000

ATTORNEYS FOR AUSTRALIAN GOLD, INC.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC.,

Plaintiff/Counterclaim Defendant,

v.

AUSTRALIAN GOLD, INC.,

Defendant/Counterclaim Plaintiff.

05 CV 1217 (JS)(ML)

AUSTRALIAN GOLD, INC.,

Third Party Plaintiff,

v.

LARRY SAGARIN AND JOHN DOES, 1-10,

Third Party Defendants,

DECLARATION OF SCOTT D. MATTHEWS

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MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY and POPEO, P.C.
666 Third Avenue
New York, New York 10017
(212) 935-3000

ATTORNEYS FOR AUSTRALIAN GOLD, INC.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-- X

S & L VITAMINS, INC.,

Plaintiff/Counterclaim Defendant,

v. — 05 CV 1217 (JS)(ML)

AUSTRALIAN GOLD, INC.,

Defendant/Counterclaim Plaintiff.

-- X

AUSTRALIAN GOLD, INC.,

Third Party Plaintiff,

v.

LARRY SAGARIN AND JOHN DOES, 1-10,

Third Party Defendants,

-- X

DECLARATION OF SCOTT D. MATTHEWS

SCOTT D. MATTHEWS, pursuant to 28 U.S.C. § 1746, declares:

1. I am a member of the Indiana bar and associated with the law firm of Ice Miller in Indianapolis, Indiana. I am admitted *pro hac vice* in this lawsuit and represent Defendant Australian Gold, Inc.

2. Australian Gold's co-counsel is Francis J. Earley, a member of the New York bar and associated with Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.

3. I make this Declaration based on personal knowledge in support of Defendant's motion under Federal Rules of Civil Procedure 26, 37 and 45 to compel non-parties to (a) produce documents requested in the subpoena dated October 7, 2005 and (b) to pay Australian Gold its reasonable costs and attorneys' fees incurred in making this motion.

4. On October 7, 2005, Australian Gold served subpoenas on the four suppliers that it has disclosed as its source for the Australian Gold, Swedish Beauty and Caribbean Gold tanning lotions. Service of process was effected by hand delivery on all four suppliers. A true and correct copy of the subpoena served on and the return of service is attached hereto as *Exhibit 1*.

5. response was due on or before October 21, 2005, but they failed to respond. REDACTED

6. In an effort to avoid motion practice before the Court, Australian Gold has attempted to resolve this issue through means other than filing a motion to compel. On or about October 28, 2005, I placed a telephone call to , the contact at provided

by S&L Vitamins, at the telephone number provided by S&L Vitamins and left a voicemail message requesting to contact me. did not return that telephone call.

7. On October 28, 2005, I sent a letter to and demanding that they contact me by 5:00 p.m. on October 31, 2005. A true and correct copy of that letter is attached hereto as *Exhibit 2.* and failed to respond to that letter, and still have not responded to the subpoena. REDACTED

8. For the reasons set forth above and fully explained in the accompanying Memorandum of Law, I respectfully request that the Court grant the Defendant's motion to compel non-parties to produce documents requested in the subpoena and pay Australian Gold its reasonable attorney fees and costs associated with filing this motion.

9. I declare under penalty of perjury that the foregoing is true and correct. Executed on November 2, 2005.

Scott D. Matthews

EXHIBIT 1

Issued by the
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC., Plaintiff/Counterclaim Defendant, v. AUSTRALIAN GOLD, INC., Defendant/Counterclaim Plaintiff.	X	05 CV 1217 (JS)(ML)
AUSTRALIAN GOLD, INC., Third Party Plaintiff, v. LARRY SAGARIN AND JOHN DOES, 1-10, Third Party Defendants,	X	

TO:

REDACTED

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

See List of Documents on Attachment A

	DATE AND TIME
Offices of Mintz Levin Cohn Ferris Glovsky and Popeo, PC, Chrysler Center, 666 Third Avenue, 25th Floor, New York, New York 10017	October 21, 2005 10:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subject to this subpoena for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedures 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Australian Gold, Inc.	October 7, 2005

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Francis J. Earley, Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.
Chrysler Center, 666 Third Avenue, 25th Floor, New York, New York 10017, Phone: (212) 692-6230

(See Rule 45, Federal Rules of Civil Procedure, Parts C&D on Reverse)

PROOF OF SERVICE

DATE PLACE

SERVED ON (PRINT NAME) MANNER OF SERVICE

SERVED ON (PRINT NAME) TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on ____________________

DATE SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A Party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoenas. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A Person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden,

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

ATTACHMENT A

DEFINITIONS

1. The list of documents set forth below incorporates by reference the Uniform Definitions of Discovery Requests set forth in Local Civil Rule 26.3.

2. Without limiting the definition provided in Rule 26.3, the term "document" is used herein in the broadest possible sense and includes, without limitation, all originals, copies (if the originals are not available), non-identical copies and drafts of the following items, whether printed or recorded (through a sound, video, computer, digital, optical or magnetic recording system) or reproduced by hand: contracts, agreements, communications, writings, correspondence, telegrams, facsimiles, memoranda, records, reports, books, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, diaries, calendars, forecasts, statistical statements, work papers, e-mails, web-pages, electronic bulletin boards, ledgers, drafts, graphs, charts, accounts, analytical records, minutes or records of meetings or conferences, consultant's reports, appraisals, records, reports or summaries of negotiations, brochures, pamphlets, circulars, trade letters, press releases, notes, marginal notations, bills, invoices, checks, photographs, tape recordings, videotapes, microfilm, microfiche, floppy diskettes, lists, journals, advertisements, file folders, computer tapes and hard drives, source code, object code or other computer language or recording, and any other writing or medium for the storage, retrieval, recording, compilation, or transmission of data, whether mechanical, electromagnetic or other, of whatever description, however produced or reproduced, together with all programs, manuals, handbooks, passcodes, passwords, or any other information necessary to interpret or access such data, within your possession custody or control, including documents within the files of your attorneys, consultants, accountants or agents.

DOCUMENT REQUESTS

1. Any and all documents related to any communications between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present.

2. Any and all copies of any contracts or agreements between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin which have been executed or were in effect from January 1, 2002 through the present.

3. Any and all documents that reflect all sales made by you to S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present for any Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions.

4. Any and all purchase orders received by you from S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin for the purchase of Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions.

5. Any and all invoices related to your sale of Australian Gold, Swedish Beauty and/or Caribbean Gold Products or any other tanning lotions to S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present.

6. Any and all e-mails between you and S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin from January 1, 2002 through the present.

7. Any and all documents related to any ownership interests, management or control of your business by S & L Vitamins, Inc., thesupplenet.com, Body Source, bodysourceonline.com and/or Larry Sagarin.

8. Any and all documents which identify any distributor or supplier from whom you have ordered or purchased, or attempted to order or purchase, any Australian Gold, Swedish Beauty and/or Caribbean Gold Products from January 1, 2002 through the present, including any and all purchase orders, invoices, contracts, or agreements.

EPS Judicial Process Service, Inc.
29-27 41st Avenue, Suite 812
Long Island City, NY 11101
Telephone: 718-472-2900
Facsimile: 718-472-2909

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---X
S&L VITAMINS, INC.,

Plaintiff/Counterclaim Defendant,

-against-

AUSTRALIAN GOLD, INC.,

Defendant/Counterclaim Plaintiff,
---X
AUSTRALIAN GOLD, INC.,

Third Party Plaintiff,

-against-

LARRY SAGARIN and JOHN DOES 1-10,

Third Party Defendants,
---X

Index No. 05 CV 1217
AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
:ss:
COUNTY OF QUEENS)

MELISSA EGEBO, being duly sworn deposes and says:

I am not a party to this action, am over the age of eighteen years of age, and reside in the State of New York.

On the 11th day of October, 2005, at approximately 5:28 p.m. at ., I served a true copy of the SUBPOENA IN A CIVIL CASE, in the above entitled-action, upon ., by personally delivering to and leaving thereat, a true copy of the above mentioned document with At time of service, . identified herself as an

REDACTED

Employee for REDACTED and as a person authorized to accept service of process for

is a Caucasian female, approximately 18-24 years of age, 5'6" tall, 140 lbs, with dark hair and light eyes.

Sworn to before me this,
11th day of October, 2005

NOTARY PUBLIC

CLENDY J. CALDERON
Notary Public, State of New York
No. 01CA6115564
Qualified in Queens County
Commission Expires September 7, 2008

MELISSA EGEBO
Organization License No. 1155020

EXHIBIT 2

ICE MILLER
LEGAL & BUSINESS ADVISORS

October 28, 2005

WRITER'S DIRECT NUMBER: (317) 236-2179
DIRECT FAX: (317) 592-5418
INTERNET: Scott.Matthews@icemiller.com

Via Federal Express
No.: 8524 3512 5115 0215

REDACTED

Re: **S & L Vitamins, Inc. v. Australian Gold, Inc.**

Dear

Our law firm is legal counsel for Australian Gold, Inc. Our New York counsel sent you a federal subpoena on October 7, 2005 commanding you to produce certain documents related to your business dealings with S & L Vitamins, Inc., Body Source and Larry Sagarin. Your response was due on October 21, 2005. You have failed to respond to this subpoena and you have not contacted us to explain why your failure should be excused.

This letter shall serve as notice that we intend to file a motion to compel against you in the United States District Court for the Eastern District of New York seeking a court order compelling the immediate production of the documents which you are obligated to produce. We will also seek sanctions against you, including the attorney fees we have incurred, for having to compel your compliance with the subpoena. We will file the motion against you if you do not contact me by 5:00 p.m. on October 31, 2005 to make arrangements for the production of these documents.

Larry Sagarin has identified you as one of his suppliers of Australian Gold™, Swedish Beauty™ and Caribbean Gold™ tanning lotions. Thus, you possess documents which are evidence in our case against Mr. Sagarin. This information must not be discarded or destroyed. If you do so, we will bring a claim for spoliation of evidence against you before the federal judge.

We look forward to your timely response.

Sincerely,

ICE MILLER

Scott D. Matthews

SDM/ksw
cc: Francis J. Earley

INDY 1631957v.1